Office Supreme Court U. S.
FILED.
MAY 5 1894
JAMES H. MCKENNEY,
CLERK.

Nos. 1029 and 1030.

Brief of Carlo. Jeffries & Woodward for Appts. Cross.

Filed May 5, 1894.

Supreme Court of the United States.

OCTOBER TERM, 18.3.

AMADO CHAVES *et al.*
vs.
THE UNITED STATES *et al.*
No. 1029.

Grant of the Canon de San Diego.

PUEBLOS OF ZIA, SANTA ANA, AND JEMEZ,
vs.
THE UNITED STATES *et al.*
No. 1030.

Ojo del Espiritu Santo Valley Grant.

BRIEF IN OPPOSITION TO MOTION OF THE SOLICITOR GENERAL TO DISMISS THE APPEALS.

On February 2, 1848, the United States and Mexico made a treaty of peace, friendship, limits, and settlement, in which a large area of Mexican territory was ceded to the United States.

Article 8 of that treaty provides that Mexicans estab-

lished in the ceded territory should be free to continue where they now reside or to remove to Mexico, "retaining the property which they possess in said territories or disposing thereof and removing the proceeds where they please;" and this without contribution, tax, or charge whatever.

By article 9 the United States expressly stipulated that such Mexican residents "shall be maintained and protected in the free enjoyment of their liberty and property, and secure in the free exercise of their religion without restriction."

Article 9 of the treaty of Guadalupe Hidalgo, as originally proposed, was suppressed by the United States and article 3 of the treaty of Louisiana substituted. But by a protocol made on May 24, 1848, before the exchange of ratifications, and without which protocol it is manifest that the Mexican Government would not have ratified the treaty, the American Commissioners declare that—

"Its understanding is that all of that agreement is contained in the third article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political, and religious, which would have been possessed by the inhabitants of the ceded Territories if the ninth article of the treaty had been retained, will be enjoyed by them without any difference under the article which has been substituted."

The Commissioners further explain that the suppression of article 10 was not intended to annul grants of land in the ceded Territories, and added that "these grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals."

On December 30, 1853, another treaty was made between the United States and Mexico, whereby, in consideration of $10,000,000, the Government of Mexico released

to the United States a large additional area of territory. By article 5 of that treaty the provisions of articles 8 and 9 of the treaty of Guadalupe Hidalgo are made applicable to the territory ceded by the Mexican republic.

In consequence of this cession of territory and of these treaties a solemn duty and obligation was assumed by the United States to protect these people in their property, and the Supreme Court has expressly decided that these grants, which are perfect, and inchoate grants also, and mere equities to titles, constitute property. (Henshaw *v.* Bissell, 18 Wall., 264.)

It is the law of the United States as settled by the Supreme Court, that until the political branch of the Government provided for the confirmation of these foreign titles in acquired territory they could not be enforced in court—actions could not be maintained upon them. (Henshaw *v.* Bissell, *supra*; Astiazaran *v.* U. S., 148 U. S.)

In pursuance of this legal status in a portion of this ceded territory, to wit, that formed into the State of California, Congress, in 1851, in the discharge of its manifest duty, provided for the investigation of all the grants therein, perfect as well as imperfect, and in consequence, the titles in that State being settled and investors feeling safe in them, a career of unparalleled prosperity quickly set in. How different the situation wrought in New Mexico by the opposite policy!

In 1854, instead of referring the titles to a competent tribunal vested with authority to decide and determine upon their validity, Congress provided for an examination by the Surveyor-General, authorizing a report to itself. Under this provision much outrage has been done to law and justice by Congress, ignorant of the status of senior perfect grants, confirming many junior and imperfect ones, and thus, instead of relieving the titles from cloud, piling up litigation upon them; all of which made really a premium on lobbying, false representation, and

fraud. These confirmations, however, have not settled anything as to the titles, and have only multiplied and massed up litigation.

Frisby *v.* Whitney, 9 Wall., 187.

After the act of 1854 all of these titles were held *sub judice*, and suits could not be maintained on them or adverse rights acquired. (Newhall *v.* Sanger, 92 U. S., 761; Doolan *v.* Carr, 125 U. S., 618; U. S. *v.* McLaughlin, 127 U. S., 428; Cameron *v.* U. S., 148 U. S., 310.)

The situation was simply one of unrest and confusion; nothing could be adjudicated and nothing could be settled, and the status so remained until the passage of the act of March 3, 1891, to establish the Court of Private Land Claims. Under it quite a number of cases—about 50 out of 270 filed—have been tried. In several the claimants have appealed, and the Government manifests a general disposition of doing so. Among the former is the case of Amado Chaves *et al. v.* United States *et al.* (No. 1029). This grant was made by the Spanish governor, Concha, January 27, 1788, to the two Garcia brothers. It is absolute and unconditional in terms. On February 6 of the same year juridical possession was given.

The court (two members dissenting) refused confirmation on the ground that the grant was not perfect, in that there was no proof of the four years' occupation required by the Spanish law, during which it was liable to denouncement. In opposition to this view it had been contended that this requirement was a condition subsequent, and, as there had been no evidence of denouncement, proof of performance of a condition subsequent was not necessary. But besides this, that a grant of the exterior tract was made ten years thereafter, and on the giving of juridical possession thereunder the Garcia brothers called attention to their grant, and it was dis-

tinctly agreed that it had precedence, as is shown by the record made by the chief alcalde who gave juridical possession in both cases; also by the further fact that twenty years later there was a contestation between the Garcias and the last settlers, which was referred by the alcalde to the governor, he being the chief judicial as well as executive officer of the province, and on December 13, 1808, the governor wrote the alcalde: "The last settlers can not deny to the Garcias the better title."

This case has been appealed to this court, and, on a second application to the court, it has been advanced, and is set for argument early next term.

The other case appealed by the claimants and advanced for early hearing is that of the pueblos of Zia, Santa Ana, and Jemez. This was an additional grant made to these three contiguous pueblos by the Spanish governor of the province (Cachupin) on June 16, 1766. The alcalde having reported, the governor decreed as follows:

"And the afore-mentioned boundaries being for the future considered those of the afore-mentioned three pueblos, they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens taking their stock thereon, deeming the pasturage to be common."

And he ordered the alcalde to give the pueblos "royal possession of this grant and the boundaries therein set forth, * * * placing his proceedings on record following this my granting decree, which he will return to me, in order to furnish to each pueblo the proper testimonio of the whole, and deposit the original in the archives of this Government, where it shall remain."

In pursuance of this decree, on September 28, 1766, the alcalde gave the governors and rulers of the pueblos juridical possession, and they have been in possession ever since. The second original or testimonio was produced on the trial by the governor of Zia.

The court held this to be a mere license to pasture; but, if in the beginning it had been, still by a decree of the Spanish Cortes of January 18, 1818, it was decreed that:

"*All pastures*, inheritances and other lands of whatever class they may be, and whether free or entailed, are declared from this time henceforth forever closed and confirmed perpetually to the owners or possessors thereof."

Leyes Vigentes, 1, p. 59;
Escriche, 1236, 1260.

Under Spanish law, too, a mere license to pasture after four years of occupation became an absolute title.

In both cases the descendents and representatives of the original grantees have had continuous possession of the land granted by virtue of the decree of juridical possession.

Under Spanish law, without a grant, the claimants in both cases have an absolute title by prescription.

Both are perfect grants, and it is most improbable that either of them would have been presented to the Court of Private Land Claims had not the statute provided for an appeal to the Supreme Court.

The treaty-making power under the Constitution having made these treaties, as already stated, "the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department."

Astiazaran *v.* Mining Co., 148 U. S., 81.

This is not unusual. In the matter of the French spoliation claims the legislative elected to delegate to the judiciary certain demands against the United States;

but, instead of allowing an appeal in the regular line and in an orderly mode of judicial procedure, required a report back to itself, and then, being judicially advised of the obligation to pay, has repudiated it.

Gray's case, 21 Ct. Cls., 344.

In delegating its obligation to the judiciary the legislative branch created what it named "the United States Court of Private Land Claims," and clearly intended to constitute a court of the United States under the Constitution. It was invested by the act of Congress with all the power and paraphernalia of a court, as we shall presently see.

Whilst this power and duty of the political branch could be delegated to the judiciary, as we have seen upon authority, yet it is not disputed that it must be done in pursuance of the provisions and requirements of the Constitution, and that is the question here raised.

There is no doubt that this court is a Federal court and exercising exclusively Federal jurisdiction, for that which it exercises is power vested in the political branch of the Federal Government in carrying into proper legal effect the obligations assumed by the treaty-making power, which power is by the Constitution specially vested in the President and Senate of the United States.

It was a standing reproach to the United States that it had so long delayed to carry out the obligations it had so cheerfully assumed in connection with the territory acquired to the unfortunate people who by the cession had become American citizens. The enactment of this law was an attempt to do long-delayed justice and as reparation for a continuing wrong.

Under the provision "to make all needful rules and regulations respecting the territory or other property belonging to the United States" it is held that Congress may constitutionally legislate for the appointment of

judges in the Territories who do not so exercise the judicial power of the United States as that their appointments are "during good behavior," and, not being so, they are removable at the will of the President. Whatever may be the reader's opinion as to the soundness of these decisions, it is sufficient for the purpose of this argument that, as they rest upon the ground that such territorial judges do not exercise "the judicial power of the United States," they do not affect the case in hand, since the United States Court of Private Land Claims clearly does exercise the judicial power of the United States by direct authority of Congress in the exercise of its power to "from time to time ordain and establish" inferior courts.

The whole of this act is an example of badly-prepared and ill-considered legislation, and it needs the early consideration and construction of this court.

If the proceedings in this court provided for by the act are original in their nature, then they are without warrant in the Constitution, for the original jurisdiction of the Supreme Court is limited by the specific grants under the Constitution, and those in this act can not be brought within any of those expressly given in the Constitution, and the rule *inclusio unius est exclusio alterius* must apply.

But they are not original. An examination of the powers given in the act will demonstrate that they are such powers only as Congress might properly bestow under the provision that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." The constitutional appellate jurisdiction may be invoked by writ of error as well as appeal, and Congress may regulate the cases wherein each shall be exercised; also limit cases in which either shall apply, *e. g.*, to cases involving $5,000. So that, under its constitutional power to regulate the appellate jurisdiction as to facts,

Congress may provide the mode whereby the facts may go before the Supreme Court. The act before us does no more than this.

Under our Constitution private property can not be taken for public use without just compensation; much less can one citizen's property be taken from him and bestowed on another. If any lands were legally granted by the Spanish or Mexican authorities, it is manifest that they could not be ceded to the United States, for the title was not in the Government of Mexico to cede; and the United States acquiring no possible title thereto, and being pledged to protect the titles of the Spanish or Mexican grantees, it would simply be robbery legalized by the robber for the United States to withhold confirmation of grants because, forsooth, under its laws squatters were holding lands which were embraced within valid legal grants which had divested the titles of the former government before the cession. Yet that is just what section 14 of this act expressly does. This unconstitutional provision is so grafted upon the jurisdiction of the court that a court of limited jurisdiction, powers, and life must have regard for and enforce it, which illustrates not only the necessity of an appeal but of an early hearing thereon.

It is true that this section (14) provides that a judgment may be given against the United States for $1.25 per acre of such land, which judgment shall be a charge on the Treasury; but if the $1.25 per acre were just compensation for land worth $20 to $100 per acre, condemned under the right of eminent domain for public use, that would not sanction the seizing at any price of one man's property to give it to another. Then, too, such a judgment may "be a charge on the Treasury of the United States;" but payment can not be had without an appropriation, and when Congress fails to appropriate for "valid obligations" found by the Court of Claims under

reference of special acts of Congress, and for judgments rendered under its organic act and affirmed by this Supreme Court, then such a "charge on the Treasury" can have no intrinsic, much less commercial, value, and the proffer of one is but that of the Dead Sea fruit.

Bad as this bungling, cumbersome legislation is, it promises better things than the condition which preceded it, and delay in the settlement of these titles is the refinement of cruel injustice; but this act stripped of the right of appeal would manifestly be a monstrous iniquity.

For a full half century these titles had remained undetermined. The settler had no means of ascertaining whether his occupancy was a lawful possession or a trespass. The Government was not informed whether the land was public domain or public property. Improvements by the settler were retarded and the sale of the public lands restricted.

Valid grants are protected by law and treaty; but their validity was a question for judicial determination, and there was no court to adjudicate it. To provide a remedy Congress passed the act of March 3, 1891, to establish a "court of private land claims."

By article 3 of the Constitution Congress has power to ordain and establish courts inferior to the Supreme Court. The judges of such inferior courts are to hold their offices during good behavior, and their compensation can not be diminished during their continuance in office.

The question now presented is whether or not Congress transcended its constitutional powers in establishing and ordaining an inferior court which was to exist for a specified period, and whose judges were to be appointed by the President with a tenure of office coextensive with the life of the court.

If the questions involved in the adjudication of these titles and the determination of their validity under the laws of the United States, the law of nations, and the

treaty stipulations, demanded the scrutiny of a court of the United States, it was clearly within the power of Congress to establish such inferior court under the authority conferred by article 3 of the Constitution, and provide that the judges should hold their offices during good behavior. But suppose Congress, in establishing this court, knew from the very nature of things and the purpose for which it was established that its functions would necessarily be discontinued at a fixed period of time, because at the expiration of that period the occasion and object of its creation would no longer exist, would such limitation of its life tenure affect its character as a court of the United States? In other words, is the existence of United States courts authorized by article 3 of the Constitution required by that instrument to be perpetual? On the other hand, if Congress may under said article establish and ordain an inferior court whose life tenure shall be determined by its creator, then it would be repugnant and inconsistent to provide for the appointment of its judges for life when the existence of the court is limited to a period less than a lifetime. Rationally, the tenure of office of the judges would be coexistent with the life of the court, or for good behavior during said period.

We submit, therefore, as the object to be accomplished by the establishment of such inferior court does not require that its existence should be perpetual, it is during its existence a court of the United States, invested with judicial power under the Constitution, and that the judges' tenure of office is during good behavior within the period for which the court was established.

The cases discussed by the Supreme Court, where the judges were created by authority of the territorial legislatures and those appointed for a term of years where the court was permanent, were not authorized by Congress under the Constitution, and have no application here.

All the text-writers, and, so far as we have examined, all the decisions, vindicate the wisdom of the framers of the Constitution in requiring that the judges should hold their offices during good behavior, on the ground that such tenure would secure the independence of the judiciary by placing the judges beyond the interference or control of the other departments of the Government. The same principle applies to courts created by Congress whose existence is limited to a specified period, provided the tenure of the judges is coextensive with the life of the court. If the court is established for a term of five years, and the judges are appointed for a like period, their independence of the other branches of the Government is as well secured as that of judges appointed for life or during good behavior to courts that have perpetual existence.

The Court of Private Land Claims was created and designated a "court." Its chief justice and four associate justices were appointed by the President as judges of said court. The United States marshals are its ministerial officers. It appoints its clerk, who issues its writs and enters its proceedings upon its journals; subpœnas witnesses, administers oaths, makes rules for its government, is provided with a seal, requires pleadings as other United States courts, examines witnesses, makes orders, hears and decides causes, and renders judgments and decrees, from which appeals direct to the Supreme Court are authorized. In brief, it is clothed with all the attributes of a court of "inferior jurisdiction," and is in no wise, so far as this question is concerned, similar to the cases of territorial courts.

The United States having, through the exercise of the authority vested in the treaty-making power, become solemnly bound to defend these titles, the duty became devolved upon the political branch of the Government to provide the machinery to do so, and after a long delay

it did provide a court. A permanent court was not needed for the purpose, but one for a few years only. Then, in order to exercise the judicial power of the United States, was it necessary that judges for a lifetime of good behavior should be appointed for a temporary court in order that they might exercise the judicial power of the United States? We think not. The court is to last until January 1, 1896,—shall the judges be appointed for life unless in the meantime guilty of misbehavior? Is it not sufficient that they "shall hold their offices during good behavior" and so long as the offices last?—that they are not subject to removal during the lifetime of the court?

It is supposed that the case of United States *v.* Ritchie (17 How., 533) gives a negative answer to these inquiries, but an examination of that case will show that Judge Nelson (as was not unusual) does not decide the point, but goes around it. He says it has been argued that the California Commission, under the act of 1851, is not a court under the Constitution, and cannot be invested with any of the judicial powers conferred on the general government, so he treats the appeal as one from the district court exercising original jurisdiction.

He cites the case of American Insurance Co. *v.* Canter (1 Pet., 511), and it is true that in the opinion in that case it is said:

> "The judges of the supreme court of Florida hold their offices for four years. These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it."

That is true. But it is not because they "hold their offices for four years," nor yet because they were not appointed for life or during good behavior. It is because "they are legislative (territorial) courts, created in virtue

of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." The reasoning applicable to the territorial courts appointed by the President under an act of Congress is peculiarly applicable to these courts created by a territorial act. They are not "courts of the United States" under Art. III of the Constitution.

It will not be questioned that besides the power vested in Congress by article 3 to ordain and establish such inferior courts, it may also, under section 3, of article 4, by virtue of the "power to dispose of and make all needful rules and regulations respecting the Territory," etc., establish courts with jurisdiction in the Territories which do not exercise judicial power of the United States and are not "courts of the United States." (McAlister *v.* United States, 141 U. S., 174.)

Mr. Justice Nelson, who delivered the opinion in the case of United States *v.* Ritchie, delivered that also in the case of Benner *v.* Porter (9 How., 235), which he cites as authority on this particular point in the Ritchie case. If we turn to the decision in Benner *v.* Porter on this point, at page 244 we shall find the original argument very meager. Mr. Justice Nelson says:

> "The territorial courts therefore were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, *as the tenure of the incumbents was but for four years.*"

Now, this is almost a quotation of what Chief-Justice Marshall says in the case of American Ins. Co. *v.* Canter, 1 Peters, at page 546, except that he does not assign as a reason why the territorial courts were incapable of receiving the judicial power conferred by the Constitution

that "the tenure of the incumbents was but for four years." What he does say is:

"They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

To exactly appreciate the force of this important decision by Chief-Justice Marshall, on which the errors of the two subsequent decisions are based, we must look at the facts of the Canter case.

A territorial court, created under an act of the territorial legislature by authority of an act of Congress, had sold a lot of cotton which had been saved from a wreck, for the purpose of compensating the salvors. A libel was filed in the district court of South Carolina to obtain restitution of a portion of this cotton so sold, and the precise question at issue was whether the sale made under the decree of the territorial court of Florida had changed the title—that is, whether the territorial court under whose order the sale had been made was a court competent to make a sale which would change the right of property. The district court held the decree of the territorial court a nullity, and this judgment was reversed by the Supreme Court.

In the discussion of the interesting questions involved in this case Chief-Justice Marshall of course omitted none, and left nothing wanting to be said in regard to any of them. He explains that section 2 of article 3 extends the judicial power to three distinct classes of cases which the Constitution contemplates as such, and that jurisdiction over one of them does not confer jurisdiction over either of the other two, and that a case in admiralty is not a case which arises under the Constitution and laws of the United States, and consequently that jurisdiction

of an admiralty case could be vested in a territorial court created by the territorial legislature and be exercised by it without infringement of the Constitution; and he says:

"The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territory of the United States."

We submit with very great deference that the conclusion which seems to be so readily reached by Justice Nelson in the case of Benner *v.* Porter and United States *v.* Ritchie is not sustained by the reasoning of Chief-Justice Marshall in the case of American Insurance Co. *v.* Canter.

Now, the applicability of the decision of Chief-Justice Marshall to the case at bar must depend upon whether the power of Congress to establish a United States court of private land claims rests upon the authority indicated by the three distinct classes of cases to which the judicial power is extended under the first paragraph of section 2 of article 3, or whether the authority to establish said court is to be found in the "general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

This proposition brings us back to the point of considering the nature of the jurisdiction vested in this court. And what is it? Why, as already seen, a duty was devolved by the treaties with Mexico on the United States to protect the rights of property in these Spanish and Mexican grants within the ceded territory, and to require the courts of the United States to respect these "legitimate titles." This duty, in the distribution of the powers of government, was devolved on the political

branch. The whole argument which I desire here to use is embodied in a few words in the Astiazaran case (148 U. S., 81), as follows:

"But the duty of providing the mode of securing these rights and fulfilling the obligations imposed upon the United States by the treaties belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department."

By the act of March 3, 1891, Congress delegated it to the judicial department, and the question before the court and the whole issue here involved is soluble by the answer to the single proposition, namely, did Congress "delegate this duty to the judicial department?"

The duty devolved upon the court is to investigate these titles under these grants, and if regular and legally valid their decree carries a quit-claim so far as any interest of the United States goes. By this judgment the grants are given a status in court as evidence of title, and it is thus that "the grantees may cause their legitimate title to be acknowledged before the American tribunals." This is surely Federal as against the territorial jurisdiction considered in American Insurance Company *v.* Canter and Benner *v.* Porter, and these would seem to be cases in law arising under treaties made under the authority of the United States. Then this land court, in the exercise of its jurisdiction, must exercise "the judicial power conferred by the Constitution on the General Government;" and the question recurs, does the constitutional provision that the judges "shall hold their offices during good behavior" necessitate their appointment for life, notwithstanding the fact that the work of the court can be effected in a few years, and the judges are appointed, confirmed, and commissioned for the life of the court, and shall hold their offices during good behavior for the period of the existence of the court?

Is there such an infirmity in the Constitution as that, when in the administration of our governmental affairs a special court becomes requisite for some judicial work, wherein it exercises the judicial power conferred on the General Government, the judges must be appointed for life, and after they have completed the work for which their court was organized, and are *functus officio*, they must walk around with nothing to do, and yet be obliged to draw a salary?

That is not American.

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1417 G STREET, N. W.,
May 4, 1894.